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Bruce M. Botelho
Attorney General

Barbara J. Ritchie
Deputy Attorney General – Civil Division

Patrick J. Gullufsen
Deputy Attorney General – Criminal Division

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Collections & Support

OVER $35,000 IN RESTITUTION PAYMENTS COLLECTED IN MAY

Mary Simeonoff joined the Collections Unit as the Associate Attorney I responsible for collection of restitution on behalf of victims. The unit accepted 106 criminal restitution judgments and 12 juvenile restitution orders for collection. Initial notices were sent to 177 recipients; demand letters were sent to 104 criminal and 12 juvenile restitution debtors. Thirteen judgments were paid in full and satisfactions of judgment were filed. Our office received payments totaling $32,596.70 toward criminal restitution judgments and payments totaling $3,401.14 toward juvenile restitution judgments in May.

COURTS RULE IN DISESTABLISHMENT CASES

In *Wood v. CSED*, AAG Rick Sullivan defended CSED against a claim for a refund of support collected as public assistance reimbursement. The child support obligor and the custodial parent were never married. The custodial parent received public assistance on and off from 1997 to 2000. CSED issued an administrative child support order in 1996

pursuant to a 1994 default paternity judgment. CSED was enforcing the support order in October 2000 when the obligor filed a motion to vacate the paternity judgment and for paternity testing. In February 2001, a motion to disestablish paternity was filed. The motion was supported by genetic tests showing that the obligor was not the biological father. In March 2002, the obligor filed a third motion, requesting a refund of all arrears that had been collected by CSED. The obligor took the position that once the paternity results were known, CSED was barred from collecting amounts to reimburse the state for public assistance benefits paid on the child's behalf. In addition, the obligor alleged he was entitled to a refund of monies already collected for past public assistance reimbursement. The obligor, however, offered insufficient evidence that he had been deprived of due process or that extraordinary extenuating circumstances entitled him to retroactive relief under ARCP 60(b)(6). Therefore, the superior court ruled that the obligor was entitled to prospective relief only. Consequently, CSED was allowed to retain all monies collected subsequent to the disestablishment so long as those monies were owed as reimbursement for past public assistance.

In *Fratis v. Bourdukofsky*, AAG Connie Carson obtained a court order preserving child support arrears that accrued prior to disestablishment of paternity. The obligor, Mr. Fratis, filed a motion to disestablish paternity. Paternity had been established after Mr. Fratis interjected himself in a previous paternity case against his brother, Benjamin, and acknowledged paternity. CSED opposed Mr. Fratis' motion, which included a request for relief from child support arrears, because Mr. Fratis actively prevented CSED from proceeding against Benjamin, and CSED is now barred by the statute of limitations from proceeding against Benjamin for a portion of the public assistance reimbursement. The court granted Mr. Fratis' motion on April 12, 2002, stating that "all arrears shall be vacated and plaintiff's name shall be removed from the child's birth certificate." The next paragraph said that Gregory Fratis Jr. owed no "further duty of support" and indicated that plaintiff's duty of support ended on May 21, 1998, when his motion for disestablishment of paternity was accepted by the court clerk.

AAG Carson filed a motion for clarification to confirm that Mr. Fratis had a duty to support the child up until May 21, 1998, and is therefore responsible for ongoing support and any arrears until May 21, 1998, based upon his deliberate choices and actions in this case. On May 14, 2002, Judge Gleason granted CSED's request and ordered that Mr. Fratis' ongoing duty of support ended as of May 21, 1998, but that Mr. Fratis is responsible for all ongoing support and arrears that accrued up until May 21, 1998.

Commercial Section

DEPARTMENT OF REVENUE v. NORTHWEST MEDICAL IMAGING

In May, Superior Court Judge Patricia Collins reversed a ruling by a hearing officer from the Office of Tax Appeals. The hearing officer had found that Northwest Medical Imaging was not legally a corporation and therefore not liable to pay Alaska corporate income tax. Judge Collins reversed and remanded the case to the OTA for further proceedings consistent with her ruling. In a footnote, Judge Collins said, "if a business entity 'walks like a corporate duck' and 'talks like a corporate duck,' it likely is a 'corporate duck' for income tax liability purposes." AAG Mike Barnhill represented the Department of Revenue before the superior court.

STATE WINS IN PFD APPEAL

Judge Collins also issued an order affirming the Department of Revenue's decision to deny Steve Rudis' application for the 1994 Alaska

Permanent Fund Dividend. The Permanent Fund Division had denied his application on December 14, 1994. Mr. Rudis didn't appeal the denial until December 7, 2000, well after the February 11, 1995, deadline set by law. Under Department of Revenue regulations an applicant must submit a written request for review of an application denial within 60 days of the date the application was denied. Since he missed the deadline by almost 5 years, a Department of Revenue hearing officer affirmed the denial of his application. Mr. Rudis unsuccessfully appealed the department's decision to the superior court. AAG Dan Branch represented the department before the superior court.

ACPE PURSUES STUDENT LOAN COLLECTION CASE

AAG Mary Ellen Beardsley represents the Alaska Commission on Postsecondary Education (ACPE) in a dispute with Cathy Robinson, who took out student loans to attend the University of Alaska Fairbanks in the 1970's and 80's. She defaulted on the loans and they were turned over to a collection agency. She entered into a confession of judgment wherein she agreed to make small monthly payments. She defaulted on the confession of judgment and, in 1991 and 1992, three separate judgments were entered against her. She left Alaska and was later located in Texas where demand was made upon her for payment of the judgments. In 2001 she complained to Alaska's Ombudsman's Office regarding ACPE's attempt to collect these old judgments. She was advised by that office, after an extensive investigation, that she had no claim. She then complained to the Texas Attorney General who forwarded the complaint to the consumer protection unit of the Alaska Department of Law. ACPE responded in March 2002 and she has now made another formal complaint with our consumer protection unit, which has advised her that they have no jurisdiction over ACPE. Two of the three judgments are less than 10 years old and ACPE has requested AAG Beardsley to renew the current judgments by filing an action upon a judgment pursuant to AS 09.10.040(a). Once a new judgment has been obtained it will be domesticated in Texas. She currently owes ACPE $11,663.91 in principal and interest.

AHFC AWARDED PUNITIVE DAMAGES

AAG Kari Kristensen, representing the Alaska Housing Finance Corporation (AHFC), obtained a punitive damages award against a Section 8 participant in Anchorage for failing to disclose income. Federal law requires that Section 8 participants accurately report changes in income so that AHFC can determine the appropriate amount of the participant's rent subsidy. In December 1999, Section 8 participant Geneva Paige submitted written statements to AHFC reporting family income consisting of child support and Permanent Fund dividend income. In November 2000, AHFC discovered that Paige had failed to disclose to AHFC that she had been working for two different employers over an eight-month period. Based upon the unreported employment income, AHFC determined that Paige fraudulently received $2,862.42 in housing benefits during that time. AHFC terminated Paige's housing assistance and filed a civil action for public housing fraud. The case went to trial on May 28, 2002, and Judge Samuel Adams awarded AHFC compensatory damages in the amount of $2,862.42 and punitive damages in the amount of $8,587.26.

REGULATORY COMMISSION OF ALASKA

AAG Virginia Rusch represented the Regulatory Commission of Alaska (RCA) in an appeal of an RCA order that granted Anchorage Municipal Light and Power Co. authority to provide electric service to the state fish hatchery on the Fort Richardson Army Post. The dispute was not really over service to the fish hatchery, but over a larger issue of RCA jurisdiction on the military bases. Chugach Electric Association argued that the RCA has no jurisdiction over utilities operating

on the military bases. The RCA ruled that it has concurrent jurisidiction so long as there is no conflict with federal law, and that its decision to continue the past practice of requiring ML&P to list on-base customers on its certificate is not in conflict with any federal law. Chugach wanted to argue about what would happen under certain hypothetical facts that had not occurred in the case. The court found these issues were not ripe for decision.

LAW DAY

AAG Elizabeth Hickerson participated in this year's Law Day program at West High School. The theme of his year's program was access to justice and she told students about the various types of self-help and free legal assistance that may be available.

Fair Business Practices

OCCUPATIONAL LICENSING: TOBACCO ENFORCEMENT UPDATE

Retailers whose employees are convicted of selling tobacco to persons under age 19 face suspensions of their tobacco endorsement, their privilege to sell tobacco products. During the past few months AAG Cindy Drinkwater has represented the Division of Occupational Licensing in tobacco endorsement suspension hearings involving Williams Express, Tesoro, Chevron Stations, Inc., and Boniface Chevron.

This spring an administrative hearing officer issued a proposed decision in the Williams Express case, recommending a suspension of Williams' tobacco endorsement for the maximum time periods provided by statute: 45 days at two stores where employees were convicted of a single illegal sale and 90 days at three stores where two convictions had occurred. DCED Commissioner Deborah Sedwick adopted the proposed decision on April 1, 2002. Williams' petition for reconsideration was subsequently granted, and briefing is due on June 14, 2002. Decisions in the other cases are pending.

As of January 1, 2002, a new law went into effect that provides for mandatory, graduated suspensions of 20 days to one year and civil penalties from $300 to $2,500. The cases mentioned above were brought under the former law which provide for suspensions up to 45 days or up to 90 days if there are prior convictions within 24 months.

INSURANCE ENFORCEMENT ACTION

AAG Signe Andersen has been representing the Division of Insurance in an administrative enforcement action involving a title insurer's use of a joint title plant that does not maintain proprietary records and indexes reflecting all recorded instruments affecting title to land. Relying on advice from AAG Andersen, the division interprets the insurance code as requiring title insurers to own and maintain such records.

The division issued a cease and desist order to the insurer to stop noncompliance and the insurer requested a hearing. Multiple parties engaged in the title insurance business are participating in the hearing. The past few months AAG Andersen has been engaged in a discovery battle over the production of approximately 160 division and AAG documents for which the deliberative process and attorney client/work product privileges had been asserted. For many of the documents, the party seeking discovery claimed that the division had waived the attorney client privilege based on the public release by the division of an informal AAG advice memo that addressed the construction of the statutes regarding the content of title plants.

After a round of briefing and *in camera* review, the hearing officer issued a tentative ruling regarding the documents, finding that there had been waiver of the attorney client/work product privileges and that the deliberative process

privilege did not protect the documents because the public interest in disclosure outweighed the government's interest in confidentiality. After another round of briefing in May, AAG Andersen was able to persuade the hearing officer to narrow the scope of the waiver and his ruling on deliberative process on grounds of relevancy. The dispute narrowed to essentially two documents, after the division produced approximately 60 documents pursuant to the hearing officer's tentative ruling.

DIVISION OF INSURANCE PARTICIPATES AS *AMICUS* IN SUPERIOR COURT

On behalf of the Division of Insurance, AAG Nick Atwood sought and was granted leave to particpate as an *amicus curiae* in *Crawford and Co. and National Union Fire Ins. Co. v. Penny Baker-Withrow*, 4FA-00-1911 Civ. The case is on remand from the Alaska Supreme Court. The central question in the case is whether a finding of frivolous controversion by the Alaska Workers' Compensation Board ("the board") is a final appealable order. The question arises from AS 23.30.155(o) which requires the Workers' Compensation Board to notify the Division of Insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation. The purpose of this referral is to determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125. The Alaska Supreme Court determined that whether the board's finding is binding on the division is critical to the determination of appealability. Accordingly, the court remanded the case to the superior court to make findings regarding the existence of any regulations, practices, or procedures of the Division of Insurance concerning whether board findings under subsection .155(o) are treated as binding.

AAG Atwood filed a memorandum and accompanying affidavit of Director Lohr explaining the division's view of the applicable law and its general practice based on that view. The bottom line is that the division will give deference to a board finding of frivolous controversion (*i.e.,* the division will not relitigate factual findings of the board nor will the division relitigate the board's conclusion). But the division has independent authority to determine whether a violation of AS 21.36.125 has occurred, notwithstanding a board finding of frivolous controversion. Accordingly, the board's finding is not determinative or binding whether there has been a violation of AS 21.36.125.

WASTE MANAGEMENT RATE CASE BEFORE RCA

AAG Steve DeVries represented the Public Advocacy Section (PAS) of the RCA in a waste management rate case that went to hearing in May. The hearing was for the purpose of establishing Waste Management Associates' (WMA) revenue requirement that is used to set rates for refuse services provided by WMA throughout Alaska. WMA was asking for a rate increase in seven of its eight service districts. The only service area where it claimed a revenue surplus was Wasilla, which is also the only place in Alaska where it faces any significant competition. In the other seven service districts, WMA was asking for increases of:

Anchorage: 10.8%
Nome: 13.6%
Juneau: 4.9%
Kenai Peninsula (Seward, Homer, Kenai. Soldatna, etc.): 3.8%
Fairbanks/North Pole: 120.7%
Ketchikan: 13.2%
Kodiak: 14.6%

At the hearing, AAG DeVries, on behalf of the PAS, argued that the methodology used by WMA to calculate its revenue requirement was flawed and untrustworthy and could not be relied upon by the RCA to establish just and reasonable rates as required by statute. After two days of cross-examination of WMA's expert witnesses, WMA agreed with the PAS that its

data was not reliable and that it should be withdrawn from the RCA's consideration. The RCA agreed.

The net effect of this ruling is that there will be no rate increases to the seven service districts identified above at this time. WMA must refile its revenue requirement in order to seek any increase in rates, which will again be subject to PAS and RCA scrutiny.

STATE JOINS FIGHT AGAINST MAKERS OF TAXOL

In another multi-state effort aimed at stopping big drug companies from maintaining illegal monopolies over certain drugs, the state joined with over 30 other states in a lawsuit against Bristol-Meyers Squibb (BMS) relating to the cancer drug Taxol. The case alleges that BMS engaged in illegal conduct to keep generic versions of Taxol off the market when its patent for the drug expired. This allowed BMS to maintain its monopoly over Taxol and charge much higher prices. This is the second multi-state suit Alaska has joined against BMS. In addition to Taxol, the state filed suit against BMS for antitrust conduct relating to BMS' anti-anxiety drug Buspar. The state is also involved in a third multi-state pharmaceutical case involving the heart medication Cardizem.

Governmental Affairs

ENERGY RECOVERY SERVICES FOUND LIABLE FOR SAFETY VIOLATIONS

Energy Recovery Services, Inc. (ERSI), a business that recycles used oil and petroleum products in Anchorage, has been ordered to pay fines for an accident that resulted in the death of an employee.

On May 22, the Alaska Occupational Safety and Health Review Board ruled that ERSI violated certain occupational safety and health standards and ordered the company to pay $10,000 in penalties. ERSI previously paid $27,000 in penalties in partial settlement of the case.

Dale Stetler was killed at the plant on February 18, 2000, in an explosion that was triggered while he was welding near a contaminated wastewater fuel tank. Another employee was also injured by the blast.

After investigating the accident, the Department of Labor and Workforce Development cited ERSI for violating occupational safety and health standards. ERSI contested the department's citations relating to the explosion. The case was brought before the OSH Review Board in August 2001. The board found that ERSI:

> did not comply with safety standards to properly purge the tank and vent lines prior to welding and failed to take adequate precautions to prevent the ignition of flammable or combustible vapors prior to Stetler's welding near the tanks;
>
> did not inspect the area to be sure it was safe for the work to be done and did not follow safe procedures for the work specified;
>
> provided insufficient expertise to supervise welding operations in such a potentially hazardous environment; and
>
> failed to secure proper authorization for welding in the area of the tanks.

The Department of Labor and Workforce Development was represented by AAG Robert Royce.

SPRING BREAKUP CAUSES FLOODING DISASTER

Spring flooding kept AAG Mike Mitchell busy working with the Governor's Disaster Policy Cabinet and the Department of Military and Veterans' Affairs, Division of Emergency Services (DES) to evaluate the situation and prepare a disaster declaration for the governor.

Rapid breakup of river ice in several Alaska river drainages resulted in the formation of ice dams that blocked and backed up the Kuskokwim, Nushagak, Yukon, Tanana, and Susitna rivers. This caused flooding in a number of communities, including McGrath, Lime Village, Sleetmute, Red Devil, Crooked Creek, Aniak, Kwethluk, Ekwok, and New Stuyahok, in portions of the Fairbanks North Star Borough, and in the Chase and Montana Creek areas. Roads, several airports, public utilities, and public and private buildings were damaged, and some residents of Old Aniak had to be evacuated by air. Damage and recovery costs are estimated at approximately $7.8 million. Mike advised DES and the Disaster Policy Cabinet in their assessment of the situation and their recommendation that the governor declare a state disaster emergency, and he worked with DES and the governor's office to prepare the disaster declaration. The governor declared a disaster emergency on May 30 and subsequently requested that a federal disaster be declared, which is still under consideration. The flooding subsided fairly quickly; however, the recovery and rebuilding efforts continue.

AITC CASE GOES TO THE JUDGE

We completed post-hearing briefing and oral argument in state superior court on the case *Alaska Intertribal Council v. State of Alaska, et al*. This case concerns a challenge by plaintiffs to the allocation of Alaska State Trooper resources throughout the state. The case is now under advisement, pending decision by Judge Gleason.

LIEUTENANT GOVERNOR'S BALLOT SUMMARY UPHELD

We prevailed in the state superior court on a challenge to the ballot summary prepared by the lieutenant governor for the legislative session move initiative, 01CHGE. The initiative sponsors had challenged the lieutenant governor's ballot summary, and the court upheld the summary, holding that the ballot summary was a true and impartial description of 01CHGE. The initiative sponsors immediately filed an appeal to the Alaska Supreme Court, seeking a decision on the ballot language before the August 20, 2002, ballot printing deadline. The superior court's decision is now on expedited appeal to the Alaska Supreme Court, and the state's brief is due on July 3, 2002. We expect a decision from the court on this matter before August 20, 2002. AAG Sarah Felix is handling this case.

Human Services

MEDICAID RECOVERY RIGHTS RECOGNIZED IN TORTS CASE

When a person applies for Medicaid, he or she assigns rights of recovery to the state for medical expenses that may be due from potentially liable third parties such as insurance companies or tort feasors. Similarly, the Division of Medical Assistance may assert its third party liability subrogation rights and record a lien for medical services provided to a Medicaid recipient to ensure that Medicaid is paid back before lawsuit proceeds go to a Medicaid recipient.

In a pending civil torts case in which the state is not a party, the plaintiffs asked the superior court to declare that the state has no Medicaid subrogation rights in the misrepresentation and breach of contract case. The plaintiffs argued that the Medicaid recipient, plaintiffs' minor child, was not a party to the case and that the

damages sought are not for medical expenses that fall under the Medicaid statutes. However, AAG Dawn Carman, representing the Division of Medical Assistance, asserted that even though the Medicaid recipient is not a named plaintiff in the case, the plaintiffs' complaint is full of references to the Medicaid recipient's medical assistance costs that are included in their broad claims for compensatory and punitive damages. The court denied plaintiffs' claim for declaratory relief and recognized Medicaid's interest in the case.

SUPREME COURT ISSUES DECISIONS IN FOUR CHILD PROTECTION CASES

The Anchorage office received Alaska Supreme Court decisions in four Child In Need Of Aid (CINA) appeals this month. The first decision, *E.A. v. DFYS*, WL 959914, May 10, 2002, had originally been issued by the court as an unpublished Memorandum Opinion & Judgment (MOJ) back in February. We felt that the opinion stated new law in two areas: first, its holding that a trial court may look to the totality of efforts provided by DFYS to a family over time, rather than just to the most recent efforts provided in relation to a specific child, when deciding whether to terminate a parent's rights to a child; and second, its discussion limiting its statements in *C.J. v. DHSS*, 18 P.3d 1214 (Alaska 2001), regarding the necessity for expert witnesses in Indian Child Welfare Act (ICWA) cases to have had personal contact with the members of the families about which they are testifying. The court agreed with our position and granted our motion to publish this decision.

The second case, *T.D.W. v. State*, *DFYS* (MOJ #1076, May 1, 2002), dealt with the same basic issues as *E.A.*, but went beyond that case. The supreme court's decision held that the department need not pursue efforts that are bound to be futile before terminating a parent's rights in an ICWA case (the court, having looked at this father's history of violence against family members and his treatment history, impliedly found that no amount of efforts would remedy his behavior), and it approved case-specific testimony by an ICWA expert who had never had contact with any members of the family about which he was testifying. Unfortunately, the court denied our motion to publish this opinion, so its holdings cannot be cited as precedent.

The court decided two other appeals by unpublished MOJ, but neither of these opinions broke new ground and we did not request that the court publish either decision. In *State, DFYS v. V.S.* (MOJ #1078, May 15, 2002), an ICWA case, the department appealed Judge Gonzalez' decision declining to terminate a father's rights to his child because of the department's failure to make active efforts toward the father. The supreme court noted that the record would have supported a finding that sufficient efforts had been made, and that the efforts only failed because of the father's failure to cooperate. But the court went on to hold that Judge Gonzalez' finding was not clearly erroneous. The court did, however, reverse the trial court's order to DFYS to reunite the father with his child, instead remanding the case to allow the department the chance to provide the family with the required efforts before reunification or termination.

Finally, in *A.D. v. State*, *DFYS* (MOJ #1077, May 15, 2002), the supreme court upheld termination of a mother's parental rights, rejecting her claims that DFYS had failed to provide her with reasonable efforts and that she did not pose a risk of harm to the child. The mother, with a long history of substance abuse and DFYS involvement, admitted that the state had made efforts, but she claimed that the state's requirements were unduly burdensome, that DFYS was biased against her, and, further, that she did not have a substance abuse problem in the first place. The court found her arguments to be unavailing. While we were awaiting the decision in this appeal, the trial court terminated the same mother's rights to her youngest two children, an infant and a

toddler (her seventh and eighth children since turning 14).

Legislation/Regulations

LEGISLATURE EXTENDS REGULAR SESSION; SPECIAL SESSIONS CALLED

During May 2002, the Legislation and Regulations Section spent a busy month with the legislature extending its regular session and calling itself into a second special session. Also, the governor had issued a special session proclamation, which was later withdrawn. The governor has called the legislature back into a third special session on June 24, 2002. The section was busy providing legal assistance to the governor's office and affected state agencies.

The section was also processing about 153 bill reviews. The section appreciates everyone's efforts to expedite the preparation of the bill reviews.

The section conducted legal reviews and approved for filing the following regulations: Whittier tunnel toll revisions (DOTPF), Medicaid payment revisions for disproportionate share hospitals (DHSS), solid waste management program fees (DEC), Board of Fisheries Cook Inlet area commercial, sport, and personal use fisheries(F&G), Board of Game's statewide and interior region (F&G), occupational licensing fees (DCED), pipeline right-of-way lease (DNR), ATAP eligibility (DHSS), assisted living (DHSS/DOA), police standards (DPS), air quality (DEC), and pioneers' homes rate increases (DOA).

Additionally, the section aided in the implementation of Executive Order 103, which transferred certain filed "old" regulations from the lieutenant governor to the state archivist.

Natural Resources

TRUE NORTH MINE

In the True North Mine Project appeal, the superior court denied the public interest litigant's motion for additional fees of $6,960 (for post-decisional work and work unrelated to the administrative appeal). The court also denied the public interest litigant's motion for reconsideration of the court's previous award of full and reasonable attorney's fees (the fees awarded were 54% of the fees the amount requested).

The Fairbanks Natural Resources section is assisting DNR on additional decisions related to this project: the DNR decision on the True North mine pit expansion and the decision on remand regarding the economic benefits of the right-of-way.

NONRESIDENT FEE CASE ON APPEAL FOR THIRD TIME

On May 7, the state argued its appeal to the Alaska Supreme Court in an eighteen-year-old lawsuit (known as the *Carlson* case) involving fees for nonresident commercial fishers. Back in 1984, nonresidents filed a class action challenging Alaska's practice of charging them up to three times more than comparable residents for limited entry permit and crewmember license fees. The suit was brought under the Privileges and Immunities Clause and the Commerce Clause of the U.S. Constitution. Although the state has twice prevailed on summary judgment, the Alaska Supreme Court reversed and remanded each of those decisions. After the last remand, Judge Michalski entered a split decision with rulings favoring each side. If that decision were upheld, Alaska would owe the plaintiffs about $22.5 million in fee refunds and interest. The supreme court is expected to enter its third

ruling in this case next fall or early in 2003. AAG Steve White is handling this case.

LEGISLATIVE ACTION OVERRULES *COOK INLET KEEPER* DECISION

On May 3, 2002, the Supreme Court ruled in *Cook Inlet Keeper v. State of Alaska* that the state had a statutory duty to conduct a project-specific consistency review encompassing all activities for which a project had already received a general permit. Previously, the state had not done a second consistency review of activities already reviewed under a general permit. In response to the court's ruling, SB 371 was signed by Governor Knowles; it is meant to overrule the court's new requirement of a site-specific review of general permits. SB 371 should put the review process under the ACMP back to where it was before the court's ruling.

COURT OF APPEALS RULES IN *STATE V. ROZAK*

This month the Alaska Court of Appeals issued a decision interpreting 5 AAC 39.107, a regulation adopted by the Board of Fisheries to govern the operation of fishing gear. The regulation establishes a general rule that people who operate stationary fishing gear (set nets or fish wheels) must remain at the site of their gear while it is operating. Mr. Rozak is a Cook Inlet set netter who was prosecuted for violating this requirement.

The district court dismissed the prosecution of Mr. Rozak based on a challenge of the constitutionality of the regulation. The state appealed because the district court disregarded the case of *Baker v. State*, 878 P.2d 642 (Alaska App. 1994), which involved a similar constitutional challenge.

The Court of Appeals reversed the decision below and directed reinstatement of the prosecution against Mr. Rozak. With great detail, the court reviewed the Board of Fisheries deliberation on the regulation. Consequently, there should be no confusion now as to interpretation of the operation of gear regulation.

HALIBUT APPEALS

The state filed a consolidated appeal brief with the Alaska Court of Appeals in three cases from the Homer District Court. Each case involves the landing and sale of halibut by a fisherman who did not have an interim-use permit for halibut from the Commercial Fisheries Entry Commission. The defendants argued in the district court that an interim-use permit could not lawfully be required by the state. The appellees have each declined to submit a brief to the Court of Appeals, relying instead on the record in the lower court. The state continues to require an interim-use permit for the landing and sale of halibut in Alaska while the appeal is pending.

F/V TSIU FORFEITURE SETTLEMENT

The owners of a vessel used in a closed waters commercial fishing violation agreed to pay the state $72,500 in cash and property in lieu of forfeiture of their seine vessel. The violation occurred in August 2000 in Redfish Bay on Baranof Island. The violations were so blatant that two other fishermen in the area tried to stop them by taking photographs, making radio contact, and yelling and waving. Both were so upset that they independently reported the poaching to Fish and Wildlife Protection. The skipper and skiff man had already been convicted of misdemeanors and given substantial fines and jail sentences. Pat Gullufsen handled the criminal trials and the subsequent appeal, which was recently resolved in the state's favor.

U.S. v. HARLAN MAHLE

AAG John Baker represented the state in a Native Allotment hearing, *U.S. v. Harlan Mahle*, held May 28-31 in Skagway. The heirs of Mahle, who is deceased, claim roughly 5 acres

of state-selected land, in addition to some 40 acres of state-owed land, all of which has also been selected by the City of Skagway under AS 29.65. The metes-and-bounds description of the 40-acre parcel on the original allotment application describes land that was unavailable for selection by the allottee. Consequently, the Mahle heirs contend that the original description is a mistake. The state's position is that the heirs' attempt to "correct" the description at hearing constitutes an untimely amendment of the allotment application, under Section 905(c) of ANILCA. Under that statute, an allotment parcel description can only be amended within 60 days of the final conformance of the allotment to survey, which in this case occurred in 1988. Post-hearing briefing will be concurrent, with opening briefs due in late August and reply briefs following 30 days later.

Oil, Gas & Mining

EXXON MOBILE ROYALTY CASE SETTLED

AAGs Virginia Ragle and Lisa Kirsch assisted Department of Natural Resources, Division of Oil & Gas, in settling an old royalty case with Exxon Mobil. The case was filed in superior court several years ago and came to nearly a complete standstill during the period of Exxon's merger with Mobil. Exxon Mobil has agreed to pay the state $1,850,000 in additional royalties and interest owed for Mobil's Cook Inlet oil and gas production from 1986 through 1996, prior to its merger with Exxon.

CORPORATE INCOME TAX CASE RESOLVED

An oil and gas corporate income taxpayer agreed to pay the state an additional $1,508,675 in principal and interest to close fully and finally tax years 1982 through 1984. These years had been previously resolved, but opened again as a result of the taxpayer's filing of an amended return for 1982, reflecting changes to its federal taxes for that year. After research and settlement discussions, and upon payment by the taxpayer of $1,508,675, the parties agreed that the 1982 - 1984 tax years are now fully and finally settled. AAG Jan Levy assisted the Department of Revenue in this matter.

Special Litigation

STATE GETS MONEY BACK IN SETTLEMENT OF WORKER'S PERSONAL IINJURY CASE

For a number of years in the 1990's, Mary Jane Pilgrim was the supervising chemist at the ADEC Lab in Juneau, which is located in a state-leased building. Claiming that she suffered from Thallium poisoning due to faulty ventilation at the lab, Dr. Pilgrim sued the building owner and property manager. The property manager, in turn, brought a third-party claim against the state and several other entities, on the theory that the fault for Dr. Pilgrim's injuries, if any, should be allocated among all parties involved in designing, constructing, or maintaining the building, pursuant to AS 09.17.080.

Because Dr. Pilgrim's exclusive means of recovery from the state, her employer, is workers' compensation benefits, the state had no possible monetary liability to her in this personal injury litigation. However, the state did incur expenses in having to participate in discovery and respond to several motions. The state's efforts to tender these costs under a hold harmless provision in the building contract were denied, until a recent settlement of the case. In a two-day mega-mediation involving nearly a dozen parties and insurers, a global resolution was reached. In addition to the payments to be made by other parties to Dr. Pilgrim, the state, represented by AAG Tom

Slagle, was able to recover $25,000 as partial reimbursement of attorney's fees and costs incurred in the case.

SUPREME COURT UPHOLDS JUDGMENT IN STATE'S FAVOR – NO LIABILITY FOR HOTEL FIRE

In a case with $30 million at stake, the Alaska Supreme Court affirmed a trial court's judgment in favor of the state, finding no liability. The suit against the state fire marshal's office arose out of the destruction of the Denali Princess Hotel by fire in 1996. After paying $18 million to rebuild the hotel, the insurance consortium sought reimbursement from the state, alleging negligence in the initial building plan review and subsequent safety inspections. The state was able to demonstrate, as a matter of law, that the insurance companies' reading of the Uniform Building Code was erroneous, that the fire marshal had not erred in his application of the code at the time of the plan review, and there had been no errors in the annual inspections. Fortunately for everyone there were no personal injuries. The hotel was destroyed in the off-season while maintenance was being performed.

AAG Randy Olsen represented the state, opposite three attorneys for the insurance companies, one from Seattle and one from Portland, who worked for the same international law office, and their Alaska co-counsel. On appeal, a Chicago law firm was substituted as counsel for the insurance companies. Not only did the state prevail in winning judgment without trial, but it was awarded more than $50,000 as partial reimbursement for its costs and fees, over the protestations of the plaintiffs. That award was also affirmed on appeal.

SUPREME COURT UPHOLDS VERDICT IN VEHICLE ACCIDENT CASE

The Alaska Supreme Court upheld a jury verdict in favor of the state and Chugach Electric Assoc. arising out of a single vehicle rollover accident on DeArmoun Road. The court reaffirmed its holding in the Industrial Indemnity case that the state is immune from claims of failing to build a guardrail at a given location. The court also ruled that there is no duty to maintain roads to modern design standards, but only to their as-built condition. We anticipate that this will be a helpful decision in defending against "failure to upgrade" claims. The state was represented at trial and on appeal by AAG Venable Vermont, Jr.

MOTION TO DISMISS GRANTED IN CINA-RELATED TORT CASE

Judge Rindner of the Anchorage Superior Court granted the state's motion to dismiss on a claim for tort damages made by the grandparents of an orphaned child complaining of negligence, emotional distress, and a civil rights violation under the Alaska Constitution arising out of the child in need of aid proceedings. The court relied upon the *Karen L.* case in granting the state's motion to dismiss, holding that the state did not owe an actionable duty to the grandparents of the child (the duty owed by DFYS was to the child). The grandparents had been parties to the CINA proceedings. Plaintiffs filed a motion for reconsideration which the superior court denied. The state was represented by AAG Gail Voigtlander.

Transportation

PERATROVICH, NOTTINGHAM & DRAGE, INC. APPEALS DECISION

This litigation is an administrative appeal to the superior court. The appeal is by a disappointed bidder whose bid protest was denied by the agency, DOT/PF. The superior court has now denied both PN&D's motion for a statutory trial de novo under AS 36.30.685(b), and a discretionary trial de novo under Appellate Rule

609(b). The statutory trial de novo was denied by Judge Rindner because the statute cited by PN&D applies only to contract claims and there is no other statute which gives a bid protester a right to a trial de novo. The discretionary trial de novo was denied because PN&D did not ask for a hearing at the agency level, as required by 2 AAC 12.650. The matter will now proceed to briefing by the parties.

Thus far, the most memorable moment in this case was the court clerk telling counsel for the state: "If the court had to follow the court rules, it would never get anything done." This was in response to counsel's objection to the court treating PN&D's "Request for Trial de Novo" as a motion, without notice to the state, without briefing by PN&D, and without compliance with the appellate rules. They do litigation differently in Anchorage.

McCARTHY ROAD RIGHT-OF-WAY

This office issued a memorandum of advice concerning the width of the right-of-way of the McCarthy road between the Copper and Kennecott Rivers. The memorandum was the culmination of months of research requiring review of original source material and analysis of federal and state law and administrative actions covering the period 1898 through the 1960's. We conclude that the McCarthy road is generally 100 feet wide between the Copper and Kennecott Rivers. The opinion does not address the width of the road where it crosses subdivisions or other land conveyed after initial patent by the BLM to third parties. AAG Paul Lyle wrote this opinion.

QUALITY ASPHALT PAVING v. STATE

Oral argument was held in this case before the Alaska Supreme Court on May 6. The primary issue in the case is whether the legislature waived the state's sovereign immunity to authorize the payment of prejudgment interest on DOT contract claims filed before October 1, 2001. Of interest in the argument was one justice's remark that Quality did not have "a leg to stand on" concerning its claim for interest. It remains to be seen whether this remark reflects the opinion of the other four justices.

CENTENNIAL BRIDGE BID ERROR

This month we assisted DOT in analyzing a bid error where the bidder entered a unit price of $350 for 30 structural steel piles, but entered an extended price for this item of $105,000 rather than $10,500. The invitation for bids stated that "in the event of discrepancy between unit bid prices and extensions, the unit price shall govern." The bidder's bid was low under either extended price for the steel piles. It was unclear from the bid what extended price the bidder actually intended.

We advised DOT to apply the order of preference language, correct the extended price for the piles from $105,000 to $10,500, and award the contract to the bidder based on the lower $10,500 extended price for steel piles in order to avoid granting a competitive advantage to the contractor. The contractor accepted DOT's ruling and will perform the contract based on the lower extended price.

Criminal Division

ANCHORAGE

Carl Brown's murder retrial lasted six weeks and deliberations lasted four full days. In 1998, Brown was convicted of murder in the first degree and tampering with evidence, but the court of appeals overturned the conviction. In August 1993, Judy Burgin's decomposed body was found at Grey's Creek just south of Talkeetna. According to Dr. Propst, Medical Examiner, the victim died of blunt force trauma to the head with homicidal intent. The last anyone had seen her was four months earlier, when she was residing with Brown. Brown said Burgin left on April 19 and remembered that date because it was his brother's birthday.

However, telephone records disclosed that Burgin telephoned her best friend in Big Lake on April 24 from Brown's house. Shortly after that, Brown replaced his bedroom carpet and a small portion of the padding, although he professed the whole carpet and pad were replaced. No other room was re-carpeted, despite other carpet in the house being badly worn. Burgin's body was found wrapped in bedding from the Sheraton Hotel, where Brown had worked. Investigators also discovered a tuft of carpet in the bedding that matched a sample of bedroom carpet retrieved from Brown's house. The defense endeavored to show that any number of people could have killed Burgin and that investigation was targeted only on Brown. In addition, the defense introduced mitochondrial DNA evidence to prove that a foreign hair on the victim's panties was not from Brown or his children. Nonetheless, the jury was convinced that the series of events only pointed to Brown. Thus, the jury convicted him again. The sentence hearing for this retrial is scheduled for September.

A previously convicted sex offender was charged with five counts of SAM II for sexually abusing a 13 year-old girl. The girl was a run-away and the man admitted to sleeping with her. He also acknowledged smoking marijuana and drinking beer with her. His previous convicted was also for SAM II in 1999, for which he received a sentence of six years with three suspended and ten years probation. Bail is set at $100,000.

A man was charged with attempted murder and arson in the first degrees and two counts of assault in the third degree. The man entered the trailer of his ex-wife and her boyfriend and shot the boyfriend with a flare gun, once in the chest and once in the back, which resulted in the trailer catching fire. The ex-wife, boyfriend, and their son ran out the front door, but the defendant did not. Firefighters fought the fire for approximately two hours. A police CIRT team entered the trailer and found the defendant under a mattress. A 12-inch knife was discovered nearby, and he had apparently stabbed himself in the stomach numerous times. The boyfriend suffered only minor burns from the flare gun. Bail was set at $50,000 cash only.

A man was charged with kidnapping and assault in the second, third, and fourth degrees in a violent domestic assault against his girlfriend. When neighbors tried to intervene, they were also attacked. The male neighbor was knocked to the ground and kicked in the head several times, and his wife was struck in the face as she came to her husband's rescue. Bail was set at only $18,000.

A man was charged with murder in the first and second degrees and tampering with evidence. In the morning of May 22, 2002, he and his wife began to argue, and he told her that he had been contemplating killing her. In response, she said she was going to call the police. Since they had no telephone, she tried to leave through the front door. He prevented her from doing so and pulled a kitchen knife from his pocket and stabbed her repeatedly. Three of the 43 stabs and cuts were determined to be fatal. The wife said that she was dying and he let her leave the apartment. Neighbors and passing motorists tried to assist and called 911. He has a record in Alaska for property damage and has five charges pending in Tennessee, ranging from carrying a weapon, drugs, and domestic assault to theft. Bail was set at $500,000.

A man was indicted by a grand jury for attempted murder in the first degree, assault in the first and second degrees, and two counts of assault in the fourth degree. He became upset when his 65-year-old girlfriend forgot to give the dog his medicine, and he assaulted her. She went to summon the police, meanwhile the man confronted her adult son, said he was going to kill him and started to strangle him. The son passed out four times during the beating. The man has five assault and four DWI convictions. The son was the prior victim of assaults from the man. Bail was set at $50,000.

BARROW

Tom Temple has replaced Mary Fischer as Assistant District Attorney in Barrow.

Sara Gehrig obtained a sentence of 10 years with five suspended after convicting massage therapist Andy Ritter of multiple counts of sexual assault in the second degree on several clients. This sentence exceeded what the defendant received at his original sentencing, after which he was permitted to withdraw his plea and proceed to trial.

BETHEL

Alexie Larson was found not guilty of felony DWI and refusal after a jury trial.

In May, three men were indicted for bootlegging; three men for sexual assault; four men for felony assault; two men for felony theft; one for kidnapping and assault; one for burglary; and one for bootlegging and felony assault

Taylor Winston left for vacation, wedding, and transfer to Anchorage DAO. She will be starting in Anchorage on 6/24/02. Her replacement is still unknown.

FAIRBANKS

In personnel matters, Elizabeth Crail has started work as a felony prosecutor. She was formerly a Marine JAG attorney. Long-time victim-witness paralegal Cathy Voigt has retired and been replaced by Marja Hallsten, formerly with the AG's office in Fairbanks.

After a trial that lasted nearly two weeks, with five days of deliberation (broken up by a four day break approved by the trial judge), a jury hung in the trial of William "Wild Bill" Jones, who twice sexually assaulted a 17-year-old live-in babysitter at knifepoint. The case was eventually resolved with a plea to a lesser included offense.

For the second time in as many months, prosecutor Jeff O'Bryant went out to Ft. Yukon to select a felony jury, but was unable to do so, because of the nature of this small, close-knit community. The trials were eventually moved back to Fairbanks. Misdemeanor jury trials are suffering the same fate, but the defense bar continues to insist on trials in Ft. Yukon.

Jeff also obtained a sentence of 34 years, with 10 suspended in the case of 65-year-old William Peter of Kaltag. Peter was convicted of first degree murder for shooting a good friend after the victim refused to leave Peter's home following a day of heavy drinking.

The grand jury heard a series of domestic violence strangulation assault cases and also indicted a man for driving a stolen vehicle, with the mother of his 14-year-old girlfriend dragged alongside. The mother was attempting to retrieve her daughter from the vehicle when the defendant drove off at a high rate of speed.

Fairbanks City Police are investigating the likely drug-related homicide of a 20-year-old mother of three who was killed after a night of partying by an as-yet-unidentified assailant.

JUNEAU

Dick Blue Sky was convicted of 39 counts of sexual abuse of a minor in the first degree and two counts of sexual exploitation of a minor. His wife, Cynthia Sky, was convicted of 22 counts of sexual abuse of a minor. The defendants brought children to a remote island about 50 miles outside of Sitka. The children were forced to join a sex club. Part of the initiation process was to have sexual devices inserted into their genitals for a "depth test." If the children misbehaved, they were punished by time in wooden stocks. They could work off time in the stocks by engaging in Mr. & Mrs. Sky's sexual desires. Both of the defendants have prior felony convictions -- Mr. Sky for sexual abuse of a minor in Montana and Mrs. Sky for sale of cocaine.

Darrel Vandergriff was convicted of assault in the fourth degree for assaulting the former head of K-Mart security with a pilot's helmet. This was a difficult prosecution because the victim was not called to testify because he was subsequently charged with embezzling $90,000 from K-Mart. Paramedics who arrived on the scene after the assault had placed the victim in a neck brace. After returning the guilty verdict, the district court judge granted a motion of judgment for acquittal because the victim was not called to say he suffered pain. After consulting the Office of Special Prosecutions and Appeals, we have concluded that this is an appealable issue and the state is appealing.

KENAI

The grand jury indicted a woman for MICS III for providing marijuana to two teen-aged girls. Shortly thereafter the same woman was arrested for felony assault charges when she drove drunk with her two children in the car and ran into another car, causing injuries to her son and the other driver.

A man was indicted on two counts of perjury based on his testimony at his felony trial in January 2002 and testimony at his subsequent felony sentencing in April. The police had found a concealed handgun on the man, but the court suppressed the man's admission to the police that he had lied about having the gun. At trial, the man again lied about having the gun. The man was convicted anyway, for being a felon in possession and DWI.

During his interview for the presentence report, the man told the probation officer another story about the gun, and then at the sentencing hearing, he took the stand to deny making that statement contained in the presentence report. The probation officer also testified and provided a copy of her notes from the hearing that included the statement practically verbatim.

The Kenai grand jury indicted three men for a home invasion robbery in the Cooper Landing area. They apparently found nothing, but terrified a woman for several minutes by pointing and discharging weapons in the home and into her car.

KETCHIKAN

Ketchikan had five jury trials in May, but only one resulted in a conviction. Cisco Bitonti was convicted of second degree theft in Craig, for stealing a skiff motor in Hydaburg. Wayde King was acquitted of violating a protective order in Ketchikan. David Hutte's trial for fourth degree misconduct involving controlled substance ended in a hung jury in Ketchikan. Jody Lindley was acquitted of DWI in Wrangell due to some minor problem with the Datamaster that, according to the Crime Lab expert, did not affect the result, but apparently the jury felt the machine should have absolutely no problems even if they do not affect the result.

A 16-year-old was indicted for murder in the first degree (under AS 11.41.100(a)(2)), murder in the second degree, and manslaughter (different theories for the same homicide) for the death of a six-week-old baby. X-rays and an autopsy found two subdural hematomas in the baby's brain, with one older than the other one. He admitted to having shaken the baby so hard that the baby stopped breathing and he used CPR to get the baby to start breathing. The baby also had several broken leg bones, and he admitted to having jumped on the baby once.

Two Ketchikan men were indicted for kidnapping, robbery in the second degree, theft in the second degree, and misdemeanor assault for assaulting two men and stealing money from them. A 32-year-old Ketchikan man, with a prior sexual misconduct conviction in Maine, was indicted for sexual abuse of a minor in the second degree when the mother of a 14-year-old boy caught the man and her son engaged in sexual relations. Five people were indicted for fourth degree misconduct involving

controlled substance. Others were indicted for assault in the second degree, failure to appear, and fraudulent use of credit card.

KODIAK

A 33-year-old Anchorage man was searched as he stepped onto the tarmac at the Kodiak airport. When found to be carrying 4.4 ounces of cocaine, including 56 pre-packaged bindles, he was arrested and indicted for misconduct involving a controlled substance in the third degree, a class B felony offense. A September trial date is pending.

A 27-year-old Larsen Bay man was arrested and indicted for sexual assault of a minor in the second degree after it was confirmed that he had been having a two-year sexual relationship with a Larsen Bay minor who is now only 15 years of age. An August trial date is pending.

A 42-year-old Kodiak man was arrested and indicted for misconduct involving a controlled substance in the second degree (class A felony) after narcotics detectives arrested him outside a local bar and found morphine sulfate tablets on him. During their interview with this defendant he admitted that he traded the tablets to women for sexual favors. An August trial date is pending.

A 22-year-old Seward man was arrested and charged with misconduct involving weapons in the second degree (class B felony) and assault in the third degree (class C felony) after emptying a .44 magnum revolver at a steel-hulled tug located on the transient float at Kodiak harbor. Fortunately no one was injured as these slugs ricocheted off the boat and around the harbor. An August trial date is pending.

A 32-year-old Kodiak man was convicted and sentenced for felony driving while intoxicated in May. He was sentenced to 22 months in jail with 18 months suspended and placed on probation for five years following this release from incarceration and was ordered to consume no alcohol as a condition of his probation.

NOME

John Earthman tried back-to-back DWI trials on consecutive days in May. The first trial went so well that John apparently felt he needed more of a challenge. In the second trial, he left three people on the jury that everyone else in office warned him should under no circumstances be left on a DWI jury. The second jury was out a long time but finally did the right thing in convicting.

The two adult defendants in the shooting of a storeowner in Stebbins during an aborted robbery entered no contest pleas to the offense of assault in the first degree and are awaiting sentencing. The 14-year-old juvenile co-defendant has remained in juvenile court. He, too, has entered an admission to the offense. Vaughn Munn, a 60-year-old defendant from Nome, entered a no contest plea in a case in which he had provided the drug oxycodone to an 18-year-old and a 20-year-old.

Seven young adults from Nome, some male, some female, have been charged with assault in the fourth degree after they beat and stomped a drinking companion who had in some manner offended the group. Other new cases include several sexual abuse of minors cases and a spate of homebrew manufacture cases. Homebrew manufacture is a felony if done in a local option village and the troopers are getting more vigorous in investigating and enforcing the law, so we are seeing substantially more cases. One man from Stebbins was summoned to court on a homebrew manufacture case, but before his court date rolled around, he was arrested on a second alcohol manufacture case.

KOTZEBUE

Dennis Stoyer of Kotzebue was tried on a contempt-of-court charge for failure to perform

his duties as a third-party custodian. He had not reported the defendant for violating his conditions. After the jury's guilty verdict, Judge Erlich imposed three days jail time for Mr. Stoyer. Also tried was David Stein, Jr., on a domestic assault charge, the alleged victim being his sister. The defendant and most of his family testified, with the victim recanting at trial. Stein was acquitted, but during his testimony (and that of his family members), a violation of conditions of release was clearly established. Additional charges were filed at the conclusion of the evidence.

The rural Alaska version of Police Memorial Day was held on May 13, 2002, in Kotzebue, with police agencies from many of the smaller communities in Western and Northern Alaska in attendance. The event was broadcast region-wide on the radio. ADA Windy East and DA John Vacek were invited speakers.

PALMER

After two and a half days of deliberation, a Palmer jury convicted 38-year-old Suzette Welton of first degree murder, two counts of second degree murder, attempted first degree murder, and first degree arson. During the lengthy trial, the prosecution presented evidence that on September 15, 2000, Welton drugged her two sons and set fire to their duplex. Samuel Welton, 14, died in the fire, and Jeremiah Welton, then 16, escaped by jumping through a second-floor window. Welton had purchased $200,000 worth of life insurance on the boys a couple of months before the blaze. Welton will be sentenced on October 9, 2002.

OSPA
(Office of Special Prosecutions & Appeals)

Prosecution News

Christopher Hill, a personal-care attendant, pleaded no contest to stealing from the state Medicaid system. Hill was originally charged with various felony and misdemeanor counts for falsifying pay sheets sent to the Medicaid office for days he had actually not worked. Hill received a one-year S.I.S. on a theft charge and was required to perform 40 hours of community service. He was also ordered to pay over $6,000 to the state Medicaid office.

Elizabeth Vazquez, the statewide welfare fraud prosecutor, spent an entire day in grand jury proceedings in Fairbanks. Six people were indicted for a total of 28 counts of felony welfare fraud. These indictments were reported in the newspapers and radio in Fairbanks and in Anchorage.

Petitions & Briefs of Interest

Elements of failure to appear. The state argued in an emergency petition for review that the elements of the offense of failure to appear are (1) a knowing failure to appear in court and (2) a condition of bail release that had required the appearance. But the offense does not require the state to prove the defendant's subjective awareness of the required appearance; the state need prove only that the defendant had notice of the required appearance. The court of appeals denied the petition without comment. *State v. Morrow*, No. A-8322.

Briefs of Interest

Duty to present exculpatory evidence at grand jury. The state argues the prosecutor was not under an obligation to present evidence to the grand jury of which she was not aware and which, in any event, was not exculpatory. The evidence – a tape recording of the defendant's belated demand to provide a breath sample, which the defendant claims indicated his subsequent consent to taking the breath test – had not been listened to by the prosecutor nor mentioned by the police officer

in his police report. *Richardson v. State*, No. A-7857.

Protective frisk for weapons – scope. The state argues to the Alaska Supreme Court that when a police officer during a protective frisk feels in a suspect's shirt pocket a hard, three-inch-long object which he cannot otherwise identify, and which the suspect refuses to identify, the officer can take the minimally intrusive step of looking in the pocket. The state argues that the court of appeals' decision to the contrary misconstrues the reasonable-suspicion standard and thwarts the primary purpose of the frisk – to ensure the officer's safety. *State v. Wagar*, No. S-10369.

Habeas statute of limitations – equitable tolling. The state argues to the Ninth Circuit Court of Appeals that the defendant's claim that he suffered from a long-standing mental illness that prevented him from understanding and complying with the procedural requirements for filing his habeas petition fails to establish the grounds for the equitable tolling of the statute of limitations for filing the petition. The state agrees that the defendant suffers from a personality disorder but that it did not prevent him from complying with the statute of limitations and was not a ground for equitable tolling. *Blackhurst v. Pugh*, No. 02-35125.

Court Decisions of Note - Alaska

Statute and Rule Interpretations

The Alaska Court of Appeals interpreted AS 22.07.020(b) and AS 12.55.120(a), which specify that the court of appeals can hear only appeals of a felony sentence of more than two years and a misdemeanor sentence of 120 days, as setting only a threshold on which sentences can be appealed and not on the types of claims that can be made in those appeals. *Richardson v. State*, Op. No. 1803 (Alaska App., May 17, 2002).